

limiting the availability of support for internal connections to twice every five years, is intended to make support available to more applicants on a regular basis. How does this action affect the need to adjust the discount matrix? We further seek comment on which discount rates in the matrix, if any, other than the highest discount rate band, should be reduced. Additionally, we seek comment on whether developing a separate discount matrix for Priority Two funding would effectively address issues of waste, fraud, and abuse and expand the reach of funds to a larger number of schools and libraries.¹²⁰ Many parties have suggested that, at a minimum, the maximum discount level for internal connections be lowered to 70 percent.¹²¹ What would be the effect of such a change? While we seek comment generally on revisions to the discount matrix, we note that we are not seeking comment on whether to combine the existing Priority One and Priority Two funding categories.

62. We ask that commenters address implementation issues surrounding a change in the discount matrix. Currently, in the event that there are not sufficient funds remaining under the annual cap to support all requests for discounts at a particular discount level, funds are allocated on a pro rata basis among applicants at that discount level.¹²² Should funds continue to be allocated among all applicants at the discount level on a pro rata basis, or is there some other means of allocating the remaining funds? We seek comment on how changes to the discount matrix should be implemented across all levels of need. Should certain existing discount levels be combined? For example, should the 90 and 80 percent discount levels be combined? In the alternative, should each discount level be reduced by a fixed amount? For example, should each discount level be reduced by 10 percent? Is there some other method of re-setting other discount levels below the highest discount level? Finally, we seek comment on how the transition to a new discount matrix, if adopted, should be implemented in order to minimize burdens on applicants and disruptions to the program.

B. Competitive Bidding Process

63. We seek comment on the current process of applying for discounted services. Pursuant to competitive bidding requirements, eligible schools and libraries that wish to receive support for discounted services must submit FCC Form 470 to the Administrator.¹²³ The FCC Form 470 describes the applicant's telecommunication needs and notifies service providers of the applicant's intent to contract for eligible services. After the FCC Form 470 has been posted to the

¹²⁰ Since inception of E-rate program, all eligible requests for Priority One services have been funded, but there have been funds available for only a portion of eligible requests for Priority Two services. Further, concerns have been expressed that a comparatively higher occurrence of waste, fraud and abuse problems exists among Priority Two services. Update on USAC Task Force on the Prevention of Waste, Fraud and Abuse: Meeting #3, at <http://www.sl.universalservice.org/taskforce/update3.asp>; see also CCSSO NPRM Comments at 47-48; Pennsylvania Board of Education NPRM Comments at 7; State of Alaska Department of Education and Early Development NPRM Reply at 6; Iowa DOE NPRM Comments at 9.

¹²¹ See, e.g., Greg Weisiger NPRM Comments at 6, ISBE NPRM Comments at 26; SECA NPRM Comments at 16-18; Tel/Logic NPRM Comments at 9-10; Wisconsin NPRM Comments at 2-3.

¹²² 47 C.F.R. § 54.507(g)(1)(iv).

¹²³ 47 C.F.R. § 54.504 (b).

Administrator's website for 28 days, the applicant may contract for the provision of services and file an FCC Form 471, requesting discounts for the services.¹²⁴ We seek comment on whether this process typically results in competitive bids, and ask commenters to elaborate on the characteristics of recipients that do not ordinarily receive multiple bids.¹²⁵ We seek comment on whether this process continues to suit the needs of the schools and libraries program, or if a different application process would better suit the program's needs.¹²⁶ We specifically request that commenters discuss how the current process and any proposed processes address the Commission's goal of minimizing waste, fraud, and abuse in the program, while encouraging the benefits of competition as set out in the *Universal Service Order*.¹²⁷

64. A number of parties have suggested that the current Form 470 posting process should be modified for certain types of services. For instance, one participant in the Commission's public forum on the ways to improve the administration of the schools and libraries mechanism suggested that the Form 470 process be eliminated for requests for funding local telephone service.¹²⁸ Others suggest that the FCC simplify the application process for applications that only seek funding for local and long distance service (including cell phone service), or that seek to continue an existing telecommunications service or Internet access service.¹²⁹ We seek comment on whether it would serve our goals to simplify or eliminate the current FCC Form 470 posting process in such situations. What other mechanisms would ensure that our objective of ensuring that applicants are aware of potential service providers and select reasonably priced services is met? What would be the costs and benefits of such a change?

65. We also seek comment on how we can ensure that applicants select cost effective services in situations in which no entity, or only one entity, responds to a Form 470 posting. In some situations, there may be only one service provider capable of, or willing to, provide the requested service. How can we ensure that the prices for such services are reasonable, and do not waste scarce universal service funds? Should we adopt bright line rules that would impose limits on the amount of discounts that could be available in such situations?

66. We further seek comment on whether the Commission, as a condition of support, should require that each service provider certify that the prices in its bid have been independently developed. Such a certification could be modeled after the certificate of independent price

¹²⁴ 47 C.F.R. § 54.504 (b), (c)

¹²⁵ See, e.g., *E-Rate Public Forum*, EdLink Statement at 2 (applicants indicate that posting rarely yields multiple vendor bids) and Seattle Public Schools Statement at 2 (Form 470 posting process results in competitive bids in only a few instances).

¹²⁶ See, e.g., *Task Force Recommendation* at 5 (recommending that the complexity of the application process should better match the complexity of individual applicant situations).

¹²⁷ *Universal Service Order*, 12 FCC Rcd at 9029 para. 480 (noting that the competitive bidding process ensures that the eligible entity receives information about all telecommunication choices and receives varying, competitive bids, which preserves the fund for other eligible entities)

¹²⁸ *E-Rate Public Forum*, Central Susquehanna Intermediate Unit Statement at 3

¹²⁹ *E-Rate Public Forum*, American Library Association Statement at 2-3.

determination required under federal acquisition regulations.¹³⁰ A fair and open competitive bidding process is critical to preventing waste, fraud, and abuse of program resources.¹³¹ Adopting a certification requirement would ensure that service providers are fully aware that they may not communicate with other service providers in a way that subverts the competitive bidding process. Moreover, service providers that violate a non-collusion certification will, in many instances, also violate federal antitrust laws.¹³² Requiring certifications of independent pricing would better enable the Commission or other government agencies to enforce the Commission's rules and to seek criminal sanctions where appropriate. We also seek comment on whether the Commission's rules should specifically require that records related to the competitive bidding process for services must be maintained by both the recipient and the service provider for a period of five years.

C. Definition of Rural Area

67. We seek comment on modifications to the definition of "rural area" for the schools and libraries mechanism.¹³³ Currently, an area qualifies as rural under our rules for the schools and libraries support mechanism if it is located in a non-metropolitan county as defined by the Office of Management and Budget or is specifically identified in the Goldsmith Modification to 1990 Census data published by the Office of Rural Health Care Policy (ORHP).¹³⁴ We understand, however, that OHRP no longer utilizes the definition adopted by the Commission in 1997, and that there will be no Goldsmith Modification to the most recent 2000 Census data.¹³⁵

68. We seek comment on whether we should adopt a new definition of rural area for the schools and libraries program, and, if so, what that new definition should be.¹³⁶ We seek comment on whether there are any definitions for rural areas used by other government agencies that would be appropriate for the schools and libraries program. In addition to describing any proposed new definitions, we ask commenters to address the specific proposals that have already been raised in the rural health care proceeding. In particular, several commenters in the

¹³⁰ See 48 C.F.R. § 52.203-2.

¹³¹ *Universal Service Order*, 12 FCC Rcd at 9029 para. 480; see also *id.* at 8950 n. 819 (asking, *inter alia*, whether safeguards were needed to prevent a bidder from driving out competitors)

¹³² *Sherman Act*, 15 U.S.C. § 1

¹³³ The Commission defines "rural" for the purposes of the schools and libraries program in section 54.505(b)(3)(ii). This definition is the same as the definition of "rural area" in section 54.5 of the Commission's rules, which is used by other universal service programs.

¹³⁴ See 47 C.F.R. §§ 54.5, 54.505(b)(3)(ii).

¹³⁵ See *Rural Health Care Support Mechanism*, WC Docket No. 02-60, Notice of Proposed Rulemaking, 17 FCC Rcd 7806 (2002); see also *Kansas Department of Health NPRM Comments* at 3 (WC Docket 02-60).

¹³⁶ We note that the rural health care support mechanism uses the same definition of rural area. Recently, we sought comment on possible changes to the rural area definition in the context of the rural health care program in a separate notice of proposed rulemaking. *Rural Health Care Support Mechanism*, WC Docket No. 02-60, Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking, FCC 03-288, at paras. 63-64 (rel. Nov. 17, 2003) (*Rural Health Care Order*)

rural health care proceeding suggest that the Commission adopt the rural designation system currently utilized by ORHP, the Rural Urban Commuting Area (RUCA) system.¹³⁷ Others propose to define rural as non-urbanized areas, as specified by the Census Bureau.¹³⁸ We also recently sought comment on the definition of "rural area" in the context of increasing flexibility and the deployment of spectrum-based services in rural areas.¹³⁹ There we identified and sought comment on the following potential definitions of "rural area," in addition to the ones already identified above: (1) counties with a population density of 100 persons or fewer per square mile; (2) Rural Service Areas; (3) non-nodal counties within an Economic Area; (4) the definition of "rural" used by the Rural Utility Service for its broadband program; (5) the definition of "rural" based on census tracts as outlined by the Economic Research Service of the USDA; and (6) any census tract that is not within ten miles of any incorporated or census-designated place containing more than 2,500 people, and is not within a county or county equivalent which has an overall population density of more than 500 persons per square mile of land.¹⁴⁰ Finally, some commenters in that proceeding assert that if the Commission adopts a new definition of rural, it should grandfather existing areas that currently qualify as rural area, if they would no longer qualify under the new definition.¹⁴¹

69. Commenters are encouraged to describe the effects of any new definition on the reach of the schools and libraries program, e.g., how many existing rural areas would become non-rural and vice versa, and whether and how the Commission should consider any such changes in adopting a new definition for "rural area." We also seek comment on whether it is necessary or desirable to use the same definition of "rural" for both the schools and libraries program and rural health care program.

D. Definition of Internet Access

70. In the *Schools and Libraries NPRM*, the Commission sought comment on whether modifying our rules governing the funding of Internet content would improve program operation consistent with our other goals of ensuring a fair and equitable distribution of benefits and

¹³⁷ See, e.g., Center for Rural Health Comments at 3 (WC Docket 02-60); New Mexico Health Comments at 3 (WC Docket 02-60); University of American Health Sciences Center Comments at 2 (WC Docket 02-60).

¹³⁸ See, e.g., American Telemedicine Comments at 5 (WC Docket 02-60); Blue Cross Comments at 4 (WC Docket 02-60); Northern Sierra Comments at 7-8 (WC Docket 02-60).

¹³⁹ *Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies To Provide Spectrum-Based Services*, WT Docket No. 02-381, 2000 Biennial Regulatory Review *Spectrum Aggregation Limits For Commercial Mobile Radio Services*, WT Docket No. 01-14, *Increasing Flexibility To Promote Access to and the Efficient and Intensive Use of Spectrum and the Widespread Deployment of Wireless Services, and To Facilitate Capital Formation*, WT Docket No. 03-202, Notice of Proposed Rulemaking, FCC 03-222, at paras. 10-12, (rel. October 6, 2003).

¹⁴⁰ *Id.* at para. 12.

¹⁴¹ See Midwest Comments at 4 (WC Docket 02-60). For the 2000 Census, urban territories include urbanized areas (UA) and urban clusters (UC), which consist of core census block groups or blocks that have a population density of at least 1,000 people per square mile and surrounding census blocks that have an overall density of at least 500 people per square mile. Rural territories include areas located outside of UAs and UCs. See http://www.census.gov/geo/www/ua/ua_2k.html (visited Sept. 11, 2003).

preventing waste, fraud, and abuse. In particular, the Commission sought comment on whether to permit funding for an Internet access package that includes content if that package is the most cost effective form of Internet access.¹⁴² Comments we received in response to the *Schools and Libraries NPRM* indicated that parties had widely varying views of what should be viewed as "content,"¹⁴³ although many parties expressed concern about providing funding for Internet access bundled with subject matter content.¹⁴⁴ The record developed on this issue, in conjunction with recent changes made in the rural health care program, leads us to seek more focused comment on whether we should alter the definition of Internet access used for the schools and libraries program. Support for Internet access under the schools and libraries program is provided only for "basic conduit access to the Internet."¹⁴⁵ Support in the Internet access category has not been provided for virtual private networks,¹⁴⁶ nor has it been provided for Internet access services that enable communications through private networks. In our recent *Rural Health Care Order*, we concluded that the definition currently used in the schools and libraries context was too limited for the rural health care program, because it precludes support for features that provide the capability to generate or alter the content of information.¹⁴⁷ We concluded that adopting such a limitation in the rural health care context would significantly undercut the utility of providing support for Internet access to rural health care providers, because the ability to alter and interact with information over the Internet is a functionality that could facilitate improved medical care in rural areas.¹⁴⁸

71. We now seek comment on whether we should amend our definition of Internet access in the schools context to conform to the definition recently adopted for the rural health care

¹⁴² *Schools and Libraries NPRM*, 17 FCC Rcd at 1925 para. 25.

¹⁴³ In response to this question, several commenters urged the Commission to permit funding for virus protection, firewalls, and filtering. See Coalition for E-Rate Reform NPRM Comments at 7; Funds for Learning NPRM Comments at 7-8; Illinois BoE NPRM Comments at 14-15; and TAMSCO NPRM Comments at 2.

¹⁴⁴ See e.g. Alaska DoE NPRM Reply at 6; Arkansas NPRM Reply at 4; ALA NPRM Comments at 28; CCSSO NPRM Comments at 26; EdLINC NPRM Comments at 6; Memphis NPRM Comments at 2; NEA NPRM Comments at 10; Weisiger NPRM Comments at 24

¹⁴⁵ *Universal Service Order*, 12 FCC Rcd at 9008-09 para. 436.

¹⁴⁶ Support has been available for virtual private networks, however, to the extent offered as a telecommunications service.

¹⁴⁷ Section 54.5 of our rules states:

Internet Access" includes the following elements:

- (2) The transmission of information as part of a gateway to an information service, when that transmission does not involve the generation or alteration of the content of information, but may include data transmission, address translation, protocol conversion, billing management, introductory information content, and navigational systems that enable users to access information services, and that do not affect the presentation of such information to users . . .

47 C.F.R. § 54.5

¹⁴⁸ *Rural Health Care Order and Further Notice*, FCC 03-288, at paras. 18-29.

mechanism. The Administrator has utilized cost allocation to ensure that support is not provided for features deemed ineligible under the Commission's definition of Internet access in the schools context, and also has provided discounts on services that provide ineligible features when that ineligible portion is provided on an ancillary basis.¹⁴⁹ While we conclude that this has been a reasonable way to implement our rules in a administratively workable fashion, we are concerned that the definition adopted in 1997 may unintentionally preclude support for features of Internet access that would provide substantial benefits to school children and library patrons in the United States. We are concerned that the rule adopted six years ago may not adequately address the full ranges of features and functionalities in Internet access services that are available in the marketplace today. Moreover, we seek comment on whether amending the current definition of Internet access would simplify and streamline program administration. We also seek comment on how broadening the definition of Internet access (a Priority One service) will impact the availability of funds for Priority Two services. To the extent commenters argue that the definition of Internet access should differ for the schools and libraries program, and the rural health care program, they should provide specific arguments outlining the legal, policy, or technical reasons for that position.

E. Wide Area Networks

72. In the *Schools and Libraries NPRM*, the Commission sought comment on whether to modify its policies regarding the funding of Priority One services (telecommunications service and Internet access) that include service provider charges for capital investments for wide area networks.¹⁵⁰ The record we received demonstrated a wide range of views on what changes, if any, should be made in this area.¹⁵¹

73. In light of our decision above to impose limitations on funding of internal connections, we recognize that there may be even greater incentives than before for service providers to characterize charges for facilities that also could be viewed as internal connections as Priority One services. We believe it desirable, therefore, to seek more focused comment on specific proposals in this area to ensure that funds are distributed in a fair and equitable fashion. If we adopt rules in

¹⁴⁹ See www.sl.universalservice.org/reference/costallocationguide.asp.

¹⁵⁰ *Schools and Libraries NPRM*, 17 FCC Rcd at 1922-23 paras. 16-20. The Commission noted that in the *1999 Tennessee Order*, it had established that universal service funds may be used to fund equipment and infrastructure build-out associated with the provision of eligible services, and that in the *Brooklyn Order*, it required that discounts on non-recurring charges associated with capital investment be prorated equally over a term of at least three years. USAC has implemented these decisions through guidelines posted on its website. See <http://www.sl.universalservice.org/reference/OnPremP1.asp>, <http://www.sl.universalservice.org/reference/wan.asp>

¹⁵¹ See, e.g., Alaska NPRM Comments at 4 (permitting the lease of WANs is the most efficient way to deliver service to rural schools); BellSouth/SBC NPRM Comments at 9-12 (should be viewed as provision of service, not a lease of a WAN); Boston at 3-4 (Priority One funding should be available only for leasing of CSU/DSUs and routers; leasing of servers, filters, switches, hubs, content caches and all other on-premise equipment should only be allowed under Internal Connections); NOBLE at 1 (basic connectivity equipment, such as routers, CSU/DSU should be treated as Priority One; hubs, switches and cabling should be treated as Priority Two internal connections); Sprint at 4-5 (consider what percentage of Priority One funds support the leasing of WANs before removing leased WANs from Priority One); Worldcom NPRM Comments at 8; Worldcom NPRM Reply at 7 (look at economic depreciation lives of any funded asset; should only fund the depreciable amount in a given year).

this area, we anticipate that those rules would be effective no earlier than Funding Year 2005. We seek comment on the advantages and disadvantages of the proposals set forth below.

74. We seek comment on whether to refine a standard for determining whether expenditures that subsidize infrastructure investment, either on-premises or off-premises, may properly be viewed as Priority One services. In particular, we seek comment on whether we should adopt a rule that would limit recipients from receiving discounts for service provider upfront capital investments to the extent those capital investments exceed 25 percent of the funding request for the service in question. Such a rule could serve to spread funding for Priority One services more evenly across all recipients, and could limit the extent to which the universal service fund is used to finance significant service provider infrastructure investment.

75. In the *Brooklyn Order*, the Commission determined that recipients may receive discounts on non-recurring charges associated with capital investment made by a service provider in an amount equal to the investment prorated equally over a term of at least three years.¹⁵² We now seek focused comment on whether we should adopt a rule that discounts for any service provider charges for capital investment of \$500,000 or more must be prorated over a period of at least five years.¹⁵³ Like the other proposal, such a rule could serve to spread funding for Priority One services more evenly across all recipients, and could limit the extent to which the universal service fund is used to finance significant service provider infrastructure investment.

76. We also take this opportunity to address other issues related to the provision of service over wide area networks. Under our current rules, schools and libraries may receive support to obtain telecommunications services using lit fiber. Schools and libraries may also receive discounts when they obtain Internet access that uses lit fiber.¹⁵⁴ In order to receive support for services using lit fiber as a Priority One service, the school or library must purchase a functioning service from either a telecommunications service provider or internet access provider, which in turn is responsible for ensuring that both the fiber and the equipment to light the fiber are provided.¹⁵⁵ If a school or library enters a contract to lease unlit fiber, and obtain

¹⁵² *Brooklyn Order*, 15 FCC Rcd at 18606-07 para. 20.

¹⁵³ See New York Board of Education NPRM Comments at 3 (at a minimum, amortize costs of leasing equipment for WANs over five years to lessen drain on fund); Erate Elite NPRM Comments at 4 (extend cost recovery to five years); Great City NPRM Comments at 2 (extend cost recovery to five years); but see Arkansas NPRM Comments at 3-4 (lease expenses should be spread over three years); Cox NPRM Comments at 7-8 (three years); Excaliber NPRM Comments at 4 (three years).

¹⁵⁴ Consistent with our current definition of Internet access, the lit fiber may only be used by the school or library to access the Internet, and may not be used for communications between multiple locations, i.e., inter-school communications such as video conferencing.

¹⁵⁵ In cases in which a school or library has previously purchased equipment to light fiber, such equipment may be traded-in to the service provider and leased back by the applicant. The applicant may not use the credit for the trade-in to pay its non-discounted portion of the services. Such a contract modification would be deemed a minor contract modification under section 54.500(g) of the Commission's rules if this was within the scope of the original contract and the change has no effect or negligible effect on price, quantity, quality, or delivery under the original contract. For instance, such a change could fit within the minor contract modification rule if the original contract was for the provision of high bandwidth transmission capability.

telecommunications service or Internet access using lit fiber, it must segregate the cost of the unsupported unlit fiber from the cost of the supported lit fiber service in its application for support.

77. We seek comment on the provision of funding for unlit (dark) fiber under the schools and libraries support mechanism.¹⁵⁶ We note that the Commission has addressed dark fiber in several different contexts.¹⁵⁷ We seek comment on whether we should permit funding for dark fiber, pursuant to section 254(h), to provide additional flexibility to applicants in meeting their communications needs. We also seek comment on whether any limitations should be adopted to preclude discounts on the full cost of dark fiber network buildout when the applicant will not be utilizing the full capacity of that network.

F. Recovery of Funds

78. In 1999, the Commission adopted the *Commitment Adjustment Order*, which directed the Administrator to recover funding erroneously committed to schools and libraries in violation of the Telecommunications Act of 1996.¹⁵⁸ The Commission adopted a companion order on the same day granting a limited waiver of four Commission rules to first year applicants who had

¹⁵⁶ USAC's 2003 Eligible Services list states, "The FCC has not resolved whether unlit dark fiber is a telecommunications service. Pending resolution of this issue, it is not eligible for funding." See <http://www.sl.universalservice.org/data/pdf/EligibleServicesList101003.pdf> (dated October 10, 2003). Prior to 2003, USAC provided funding for dark fiber as set forth on its Eligible Services List: "Service providers can lease fiber capacity that does not include modulating electronics to schools and libraries, if the applicant provides the electronics to modulate the fiber. The lease of such fiber cable for obtaining Telecommunications Services or Internet access is eligible, if the applicant's electronics are located solely at the eligible school or library sites, and if the conditions apply that are described under the heading 'Wide Area Network' in the relevant section (Telecommunications Services or Internet Access)." See 2002 Eligible Services List (issued October 17, 2001), 2001 Eligible Services List (issued December 19, 2000), 2000 Eligible Services List (issued November 23, 1999).

¹⁵⁷ See *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475 (D.C. Cir. 1994) (finding that the Commission had failed to provide a sufficient analysis for concluding that unlit (dark) fiber service was a common carrier service and suspending the Commission order pending proceedings on remand), Instructions to the Telecommunications Reporting Worksheet, FCC Form 499-A, February 2003, at 22 (instructing universal service contributors not to include revenues for dark fiber services as telecommunications revenues); but see *Deployment of Wireline Services Offering Advanced Telecommunications Capability, Fourth Report and Order*, 16 FCC Rcd 15435, 15473-74 paras. 74-75 and n. 189 (2001) (declaring that a dark fiber service with respect to cross-connects is a common carrier service under the second prong of *NARUC II*).

¹⁵⁸ *Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service*, CC Docket Nos. 97-21 and 96-45, Order, FCC 99-291 (rel. October 8, 1999) (*Commitment Adjustment Order*), petitions for reconsideration pending, petition for review pending sub. nom. *United States Telecom Ass'n v. FCC*, Case Nos. 00-1500, 00-1501 (D.C. Cir. Filed Nov. 27, 2000). Petitions for Reconsideration were filed by MCI WorldCom, Inc. (WorldCom), Sprint Corporation (Sprint), and the United States Telecom Association (USTA). Additional comments in support of the Petitions for Reconsideration were filed by Nextel Communications, Inc. (Nextel) and AT&T Corp. (AT&T).

received commitments and disbursements in violation of Commission rules.¹⁵⁹ Shortly thereafter, pursuant to the *Commitment Adjustment Order*, USAC submitted to the Commission its plan to collect universal service funds that were erroneously disbursed in the first year of the program in violation of the statute.¹⁶⁰ Subsequently, in 2000, the Commission adopted with minor modifications USAC's plan to implement the requirements of the *Commitment Adjustment Order*.¹⁶¹ In that Order, the Commission also emphasized that the recovery plan "is not intended to cover the rare cases in which the Commission has determined that a school or library has engaged in waste, fraud or abuse."¹⁶² The Commission stated that it would address such situations on a case-by-case basis.¹⁶³

79. At the time the Commission adopted the *Commitment Adjustment Order*, USAC had been distributing funds through the schools and libraries universal service support mechanism for approximately one year. The Commission and USAC then faced a limited range of situations in which errors had occurred requiring the recovery of funds.¹⁶⁴ Since then, through the audit process, the Commission and USAC have become aware of additional scenarios that may require recovery of funds due to errors made by applicants and/or service providers. While the *Commitment Adjustment Implementation Order* implemented procedures, consistent with the Commission's debt collection rules,¹⁶⁵ for recovery of funds that were disbursed in violation of statutory requirements, the Commission has not comprehensively addressed the question of what recovery procedures would be appropriate in situations where it is determined that funds have been disbursed in violation of particular programmatic rules that do not implicate statutory requirements.¹⁶⁶ Likewise, the Commission has not addressed the question of what procedures are needed to govern the recovery of funds that have been committed or disbursed in situations later determined to involve waste, fraud or abuse.

¹⁵⁹ *Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service*, CC Docket Nos. 97-21 and 96-45, Order, 15 FCC Rcd 7197 (1999) (*Waiver Order*). The Order also directed USAC to waive one of its procedural requirements.

¹⁶⁰ See Letter from D. Scott Barash, Vice President and General Counsel, USAC, to Magalie Roman Salas, Secretary, Federal Communications Commission, dated October 22, 1999.

¹⁶¹ *Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service*, CC Docket Nos. 97-21 and 96-45, Order, 15 FCC Rcd 22975 (2000) (*Commitment Adjustment Implementation Order*).

¹⁶² See *Commitment Adjustment Implementation Order*, 15 FCC Rcd at 22980 para. 13.

¹⁶³ *Id.*

¹⁶⁴ The *Commitment Adjustment Implementation Order* provides two examples of errors resulting in statutory violation requiring recovery: (1) funding committed for ineligible services; and (2) funding for telecommunications services provided by non-telecommunications carriers. *Commitment Adjustment Implementation Order*, 15 FCC Rcd at 22976-77 para. 3.

¹⁶⁵ See 47 U.S.C. §§ 1.901 *et seq.*

¹⁶⁶ USAC has utilized procedures consistent with the *Commitment Adjustment Implementation Order* for situations involving rule violations that do not implicate statutory requirements.

80. In administering the schools and libraries program, we have become aware of instances in which funds were disbursed erroneously, and, depending upon the circumstances surrounding the particular error as well as the procedure or rule implicated, we determined whether recovery was appropriate. In light of these experiences, we now consider whether we should implement procedures or adopt rules governing fund recovery across particular situations and, more generally, whether additional safeguards or procedures are needed to address the matter of erroneously disbursed funds.

81. In particular, we ask whether we should adopt specific recovery rules for funds that are disbursed in violation of statutory requirements. We also seek comment on whether the Commission should implement procedures or adopt rules for funds that are disbursed in violation of one or more programmatic rules or procedures under the schools and libraries program or in situations involving waste, fraud or abuse. If so, we ask whether we should adopt for all instances of improperly disbursed funds, procedures comparable to those adopted in the *Commitment Adjustment Implementation Order*, or whether we should modify any of those procedures. We note that, through petitions for reconsideration of the *Commitment Adjustment Order* and in comments filed in support of those petitions, particular service providers have argued that the Commission should recover erroneously disbursed funds from the party that received the benefit of the disbursement, specifically the school or library.¹⁶⁷ Although the Commission continues to believe that there are valid reasons for seeking recovery only from service providers, we ask whether there are any circumstances under which recovery would be more appropriately sought from a school or library applicant. At this time we do not resolve the specific issues raised in the pending petitions for reconsideration. Instead, we seek to further develop the record in this area in light of particular issues that have come to our attention and as to which we seek comment in this notice.

82. We note that in some circumstances, there may be a series of rule violations that neither collectively nor individually implicate the full amount of the funding commitment. In the event that the full amount of the funding commitment has been disbursed under such circumstances, we seek comment on what circumstances would make recovery of the full amount of the funding commitment appropriate or inappropriate. We seek comment specifically on whether a pattern of systematic noncompliance with Commission rules warrants recovery of the full amount disbursed, irrespective of the dollars associated with specific audit findings. We note that, unlike errors resulting in statutory violations, the Commission may waive non-compliance with regulations in appropriate circumstances.¹⁶⁸ We recognize that some errors made by applicants and/or service providers may not violate the statute, may be minor in nature and may not affect the integrity of or otherwise undermine policies central to administration of the program. We invite comment on whether there are situations in which such errors would warrant a Commission decision not requiring the recovery of funds. For example, should we waive recovery if the dollars at issue are *de minimis*, either on absolute dollar or percentage of disbursement basis, and if so, what dollar level or percentage would be an appropriate threshold

¹⁶⁷ See USTA Petition at 5-8; Sprint Petition at 2-3

¹⁶⁸ See *Waiver Order*, 15 FCC Rcd at 7199 para. 6.

for deeming a violation to be *de minimis*? Parties advocating such a position should describe what mechanism the Commission should use to reach such a result, such as waiving the rules that are not statutory, are minor and do not affect program integrity, focusing particularly on how such a result could be achieved with administrative ease.

83. In addressing the issues above, we also invite commenters to explain whether any additional policies or rules directed at circumstances involving waste, fraud and abuse would be necessary, or whether procedures we may adopt in response to our questions above will be sufficient in correcting waste, fraud and abuse. In doing so, parties should consider whether certain violations are more critical in our attempts to control waste, fraud and abuse than others. Are the circumstances where waste, fraud and abuse are found the type that should result in recovery of funds from the entity that is responsible for the waste, fraud and abuse? How should we proceed if both the applicant and the service provider are culpable for such misconduct? We seek proposals that include detailed procedures for dealing with waste, fraud and abuse cases.

84. We also seek comment on whether we should implement other measures to ensure service provider and applicant accountability. In particular, we seek comment on whether we should implement procedures or adopt rules to defer action on any additional funding request involving a beneficiary for whom there is an outstanding commitment adjustment proceeding.¹⁶⁹ Under such a policy, no discounts would flow to the beneficiary in subsequent years until there was full satisfaction of the outstanding commitment adjustment. We also seek comment on whether any applicant that has previously been subject to a commitment adjustment proceeding should be subjected to more rigorous scrutiny before receiving commitments in the future. If we were to implement such a policy, what additional showing should be required of the applicant in subsequent years, and how long should the entity be subjected to such enhanced scrutiny?

85. Commenters should provide discrete proposals with examples or data to support their suggestions.

G. Other Actions to Reduce Waste, Fraud, and Abuse

86. We seek comment on a number of proposals intended to improve the abilities of the Commission and the Administrator to identify and enforce violations of the Commission's rules and, thereby, to reduce waste, fraud, and abuse in the schools and libraries universal service mechanism.

87. *Cost-Effective Funding Requests* We seek comment on whether we should codify additional rules to ensure that applicants make informed and reasonable decisions in deciding for which services they will seek discounts. Currently, our rules specify that, in selecting a service provider, a recipient must carefully consider all bids submitted and must select the most cost-

¹⁶⁹ In the *Schools and Libraries Second Order and Further Notice*, the Commission implemented rules for debarment of anyone convicted of a criminal violation or found civilly liable for actions relating to the schools and libraries program. The Commission also sought further comment on whether other circumstances not culminating in a criminal conviction or civil judgment warrant debarment. *Schools and Libraries Second Order and Further Notice*, 18 FCC Rcd at 9225-28 paras. 66-77, 9235-39 paras. 102-115.

effective service offering.¹⁷⁰ Moreover, the *Universal Service Order* makes clear that applicants must request services based on an assessment of their reasonable needs.¹⁷¹ Our rules do not expressly require, however, that the applicant consider whether a particular package of services are the most cost effective means of meeting its technology needs. Nor do our rules expressly establish a bright line test for what is a “cost effective” service. Would it be beneficial and administratively feasible to develop such a test, or, for example, a benchmark or formula for “cost-effective” funding requests, such as a specified dollar amount per student or per library patron for specified types of service?¹⁷² Should we adopt a ceiling on the total amount of annual funding that an applicant can request?¹⁷³ If so, how would such a ceiling be calculated? Are there other rule changes that would ensure applicants are not requesting discounts for services beyond their reasonable needs?

88. *Recordkeeping Requirements.* We seek comment on whether to amend our rules governing the maintenance of records related to the receipt of universal service discounts. Currently, the Commission rules require each entity receiving supported services to keep records related to the receipt of discounted services similar to those that the entity maintains for other purchases, but do not specify how long such records should be maintained.¹⁷⁴ Nor do our rules expressly require all entities to maintain records to demonstrate compliance with all rules. Recent beneficiary audits conducted by USAC’s independent auditor identify a number of instances in which the independent auditor was unable to perform certain procedures due to lack of documentation. We seek comment on whether to amend our rules to require that all records related to the receipt of or delivery of discounted services, sufficient to demonstrate compliance with the Commission’s rules governing the schools and libraries mechanism, be maintained by the beneficiary for a period of five years after the last day of the delivery of the discounted services. We also seek comment on what types of documents would be sufficient to demonstrate compliance.¹⁷⁵

89. In addition, the Commission’s rules require service providers to keep and retain records of rates charged to and discounts allowed for entities receiving supported services.¹⁷⁶ We seek comment on requiring that service providers retain all records related to the delivery of

¹⁷⁰ 47 C.F.R. § 54.511(a); see also *Request for Review of the Decision of the Universal Service Administrator by Ysleta Independent School District et al*, SLD No. 312479, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Changes to the Board of Directors of the National Exchange Carrier Association, Inc*, CC Docket No. 97-21, Order, FCC 03-313, paras. 47-55 (rel. Dec. 8, 2003).

¹⁷¹ *Universal Service Order*, 12 FCC Rcd at 9077-78 paras. 572-74.

¹⁷² See *E-rate Public Forum*, *Funds for Learning* Statement at 15 and *Sprint* Statement at 1; see also *Funds for Learning NPRM Comments* at 14; *State of Alaska NPRM Reply* at 2; *NEA, ISTE and CoSN Joint. NPRM Reply* at 7-8, and *Siemens Enterprise Networks NPRM Reply* at 3.

¹⁷³ See *Task Force Recommendation* at 4 (supporting imposition of a funding ceiling).

¹⁷⁴ 47 C.F.R. § 54.516(a)

¹⁷⁵ We note that we recently adopted such a rule for the rural health care support mechanism. See 47 C.F.R. § 54.619

¹⁷⁶ 47 C.F.R. § 54.501(d)(3)

discounted services for a period of five years after the completion of the discounted services. Further, we seek comment on a requirement that service providers comply with random audits or reviews that the Commission or USAC may undertake periodically to assure program compliance, including identifying the portions of applicant's bills that represent the costs of services provided to eligible entities for eligible purposes.¹⁷⁷ In accordance with this proposed requirement, we also seek comment on requiring beneficiaries to authorize the release of such information.

90. Commenters are specifically requested to address the impact that these rule changes would have on the Commission's ability to enforce its substantive rules and reduce waste, fraud, and abuse in the schools and libraries universal service program. Commenters are also requested to identify with particularity any additional recordkeeping requirements that would improve the Commission's ability to enforce its rules in the schools and libraries program.

91. *Consultants and Outside Experts.* We seek comment on whether applicants should be required to identify any consultants or other outside experts, whether paid or unpaid, that aid in the preparation of the applicant's technology plan or in the applicant's procurement process.¹⁷⁸ Additionally, we seek comment on whether consultants and other outside experts offering their services to applicants should be required to register with USAC and to disclose any potential conflicts of interests derived from relationships with service providers.¹⁷⁹ Identifying these consultants and outside experts could facilitate the ability of the Commission, and law enforcement officials, to identify and prosecute individuals that may seek to manipulate the competitive bidding process or engage in other illegal acts. We also seek comment on whether we should adopt a rule that would prohibit an entity that seeks to become a service provider from providing any form of technology planning or procurement management assistance to applicants. Under such a rule, any entity that provides management support services, technical assistance, consulting services, assistance in technical evaluations, or systems engineering services to a particular recipient would be barred from competing for the contracts for eligible services with that recipient.

92. *Distribution of Support Payments.* We seek comment on whether the Commission should amend its rules to codify certain existing administrative procedures related to the payment of support for discounted services.¹⁸⁰ There are two methods by which support for discounts is

¹⁷⁷ *Universal Service Order*, 12 FCC Rcd at 9081 para. 581 ("We agree with the Joint Board recommendation that schools and libraries, as well as carriers, be required to maintain appropriate records necessary to assist in future audits").

¹⁷⁸ Above, we adopt rules that prohibit a school or library from receiving free services, including consulting services, from a service provider that also provides services for which the school or library receives a discount under the E-rate program. See *supra* para. 41.

¹⁷⁹ *Task Force Recommendation* at 9 (recommending consultant disclosure and registration practices), see, e.g., *E-rate Public Forum*, Sprint Statement at 2 (consultants should be competitively neutral, not affiliated with service providers).

¹⁸⁰ See http://www.sl.universalservice.org/applicants/sld_flowchart.pdf describes the application process including payment of supported services.

distributed. One method is for the service provider to submit an invoice to the Administrator, seeking payment for the discounted portion of the supported service using FCC Form 474. The other method is for the recipient of the discounted services to pay the service provider and then seek reimbursement from the Administrator using FCC Form 473. Under either method, the Administrator requires that a completed Service Provider Annual Certification (or FCC Form 473) must be filed in order for payment to be made. We seek comment on whether this procedure should be codified in the Commission's rules. We also seek comment on whether the Commission should codify rules regarding the establishment of deadlines for service providers to file invoices with the Administrator.¹⁸¹ The timely receipt and payment of invoices is extremely important to the administration of the program in accordance with the Commission's rules. Accordingly, we seek comment on whether to codify the Administrator's existing policy not to provide support for untimely filed invoices.

93. USAC provides an extension of the deadline to file invoices under certain conditions. Under current USAC procedures, these circumstances include: (1) authorized service provider changes; (2) authorized service substitutions; (3) no timely notice to USAC (e.g., the service providers' Form 486 Notification Letter is returned to USAC as undeliverable); (4) USAC errors that result in a late invoice; (5) USAC delays in data entering a form that ultimately result in a late invoice; (6) documentation requirements that necessitate third party contact or certification; (7) natural or man-made disasters that prevent timely filing of invoices; (8) good Samaritan BEARs; and (9) circumstances beyond the service providers control.¹⁸² We seek comment on whether to codify the above-described procedures providing for an extension of the deadline to file invoices.

94. *Technology Plans.* We seek comment on whether the Commission should revise its rules regarding technology plans.¹⁸³ To ensure applicants make a *bona fide* request for services, the Commission requires applicants to undertake a technology assessment before making a request for services.¹⁸⁴ Section 54.504(b)(vii) states that in its FCC Form 470 the applicant must certify that it has a technology plan that has been certified by its state, the Administrator, or an independent entity approved by the Commission.¹⁸⁵ The instructions for FCC Form 470 permit applicants to certify that their technology plan will be approved by the relevant body no later than the time when service commences.¹⁸⁶ The Commission adopted specific requirements for

¹⁸¹ Currently, USAC's procedures requires that, in order to receive support, an invoice must be submitted with Form 473 or Form 474 by the later of (a) 120 calendar days after the last date of service, or (b) 120 calendar days after the receipt of Form 486, notifying the applicant of the decision to provide support for discounts. See <http://www.sl.universalservice.org/reference/InvoicingDeadlines.asp>.

¹⁸² See <http://www.sl.universalservice.org/reference/InvoicingDeadlines.asp>.

¹⁸³ See, e.g., *E-rate Public Forum*, BellSouth Statement at 12 (Commission could require more rigorous needs assessment and compliance with technology plans to ensure applicants are ready to fully utilize supported products and services).

¹⁸⁴ See 47 U.S.C. § 254(h)(1)(B); *Universal Service Order*, 12 FCC Rcd at 9077-78 paras. 572-574

¹⁸⁵ 47 C.F.R. § 54.505(b)(vii), see also *Universal Service Order*, 12 FCC Rcd at 9078 para. 574.

¹⁸⁶ FCC Form 470 Instructions.

information that must be included in the FCC Form 470,¹⁸⁷ but did not adopt specific rules addressing what should be included in a technology plan. In the *Universal Service Order*, however, the Commission set forth what applicants should address in their technology plans,¹⁸⁸ which USAC implemented in its guidelines for technology plans. We seek comment on whether we should codify USAC's current guidelines regarding technology plans.¹⁸⁹ Should we require that, as part of the technology plan process, applicants analyze the cost of leasing versus purchasing E-rate eligible products and services? Should we require the applicant to consider the most cost-effective way to meet its educational objectives? In addition, we seek comment on whether the Commission's technology planning requirements should be amended to be made more consistent with the technology planning goals and requirements of the U.S. Department of Education and the U.S. Institute for Museum and Library Services.¹⁹⁰ We also seek comment on whether the Commission's technology planning requirements could be strengthened through additional or different qualifications for entities, including states, which approve technology plans.

95. *Prevention of Unauthorized Applications by Subunits.* We seek comment on whether the Commission should adopt rules to prevent subunits, such as individual schools or library branches, from filing applications without the authorization of the central authorities over those subunits, such as school districts and library systems.¹⁹¹ We also seek comment on how such restrictions should be implemented, if adopted. For example, should an applicant be required to certify that it has the appropriate authorization from its central authority, or should a central authority be permitted to request the Administrator to reject any application filed by one of its subunits?

96. *Use of Surveys to Determine School Lunch Eligibility.* The *Universal Service Order* stated that a school may use federally-approved alternative mechanisms which rely on actual counts of low-income children to determine the level of poverty for purposes of the schools and libraries universal service discount mechanism.¹⁹² USAC implemented this provision by

¹⁸⁷ 47 C.F.R. § 54.504(b)

¹⁸⁸ *Universal Service Order*, 12 FCC Rcd at 9077 para. 572.

¹⁸⁹ See <http://www.sl.universalservice.org/apply/step2.asp>. Under USAC's guidelines, a technology plan should address the following areas. The plan must establish clear goals and a realistic strategy for using telecommunications and information technology to improve education or library services. The plan must have a professional development strategy to ensure that the staff understands how to use these new technologies to improve education or library services. The plan must include an assessment of the telecommunication services, hardware, software, and other services that will be needed to improve education or library services. The plan must provide for a sufficient budget to acquire and support the non-discounted elements of the plan: the hardware, software, professional development, and other services that will be needed to implement the strategy. Finally, the plan must include an evaluation process that enables the school or library to monitor progress toward the specified goals and make mid-course corrections in response to new developments and opportunities as they arise.

¹⁹⁰ See *Task Force Recommendation* at 5; see also <http://www.nationaledeplan.org/> (seeking comment developing the nation's third National Education Technology Plan)

¹⁹¹ See *Task Force Recommendation* at 10.

¹⁹² See *Universal Service Order*, 12 FCC Rcd at 9045 para. 510.

permitting schools to collect this information from surveys.¹⁹³ Currently, USAC procedures require a response rate of at least 50 percent to ensure a statistically valid sample to project the percentage of eligibility for all students in the school.¹⁹⁴ We seek comment on whether to codify this procedure, and if so, should we alter the required response rate? Is a 50 percent response rate higher than necessary to ensure a statistically valid sample? We seek to streamline program administration in this area while protecting against any potential abuse. Should the required response rate depend on the size of the population being surveyed?

H. Miscellaneous

97. *Determining Whether Rates Are Affordable.* We seek comment generally on how we can ensure that we continue to meet the requirements of section 254 in an efficient and equitable manner. Congress mandated that schools and libraries across the United States have access to advanced telecommunications and information services at affordable rates. As the expert agency charged with this critical task, we believe it important to consider periodically how we should determine what funding is necessary to ensure access at “affordable” rates. Give the myriad of service offerings in today’s marketplace, how can we measure our progress in ensuring “affordable” access?

98. *Priority for Applicants that Have Not Achieved Connectivity.* We note that, in 1996, prior to implementation of the E-rate program, 14 percent of public school instructional rooms (*i.e.*, classrooms) were connected to the Internet.¹⁹⁵ According to the most recently available data, in 2002, 92 percent of public school classrooms were connected to the Internet.¹⁹⁶ While considerable progress has been made in achieving the congressional goal of enhancing access of school classrooms and libraries to advanced telecommunications and information services,¹⁹⁷ we are concerned that our rules as currently structured may preclude full attainment of that goal. As noted above, a number of commenters in this proceeding have suggested that altering the discount rate would be an effective way to increase the availability of funds for eligible applicants outside the highest discount band.¹⁹⁸ We seek comment on whether other measures should be adopted to

¹⁹³ *Id.* The Universal Service Order stated that a school relying on one of these alternative mechanisms could, for example, conduct a survey of income levels in order to obtain this information.

¹⁹⁴ For example, a school with 100 students sends a questionnaire to 100 households of those students, and 75 of those households return the questionnaire. The school finds that the incomes of 25 of those 75 households are at or below the income eligibility for the National School Lunch Program (NSLP). Consequently, 33 percent of the students from those households can be counted as eligible for NSLP. The school may then project from that sample that 33 percent of the total enrollment, or 33 of the 100 students in the school, can be counted as eligible for NSLP. See <http://www.sl.universalservice.org/reference/alt.asp>.

¹⁹⁵ National Center for Education Statistics, U.S. Department of Education, Internet Access in U.S. Public Schools and Classrooms: 1994-2002 (October 2003), at Table 2

¹⁹⁶ *Id.*

¹⁹⁷ 47 C.F.R. § 254(h)(2)(A)

¹⁹⁸ See *supra* para. 60 and note 116

further the objectives set forth in section 254(h)(2)(A). In particular, we seek comment on whether we should provide priority for internal connections to those applicants that have not yet achieved Internet connectivity in their classrooms or libraries. If we were to adopt such a proposal, should the priority for funding be targeted to those entities where 50 percent or more of students are eligible for the school lunch program? Under such a proposal, any entity in an area where 50 percent or more of students are eligible for free school lunch that certifies it has not yet implemented internal connections to achieve Internet connectivity in any classrooms or in the library would receive funding for internal connections in advance of all applicants seeking funding for internal connections that certify that they have implemented internal connections to achieve Internet connectivity in multiple classrooms or locations. Are there other rule changes that would ensure that all entities are able to provide access to the Internet from individual classrooms or the library?

V. PROCEDURAL MATTERS

A. Paperwork Reduction Act Analysis

99. The action contained herein has been analyzed with respect to the Paperwork Reduction Act of 1995 (PRA) and found to impose new or modified reporting and/or recordkeeping requirements or burdens on the public. Implementation of these new or modified reporting and/or recordkeeping requirements will be subject to approval by the Office of Management and Budget (OMB) as prescribed by the PRA. Specifically, section 54.513(c) will go into effect upon announcement in the Federal Register of OMB approval, to the extent OMB approval is required.

B. Final Regulatory Flexibility Analysis

100. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),¹⁹⁹ an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Schools and Libraries NPRM*.²⁰⁰ The Commission sought written public comment on the proposals in the *Schools and Libraries NPRM*, including comment on the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.²⁰¹

1. Need for, and Objectives of, the Third Report and Order

101. In this *Third Report and Order*, we adopt rules whereby eligible entities may receive discount rates for internal connections services, except for certain basic maintenance services, twice every five years and that prohibit a school or library from transferring equipment purchased with universal service discounts, except in limited circumstances. These rules will advance the goals of the schools and libraries program by making support for internal connections

¹⁹⁹ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. §§ 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

²⁰⁰ *Schools and Libraries NPRM*, 17 FCC Rcd at 1946 paras. 83-106.

²⁰¹ See 5 U.S.C. § 604.

regularly available to a larger number of applicants and by reducing the likelihood of waste, fraud, and abuse.

2. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

102. There were no comments filed specifically in response to the IRFA. Nevertheless, the agency has considered the potential impact of the rules proposed in the IRFA on small entities.²⁰² Based on analysis of the relevant data, the Commission concludes the new rules limit the burdens on small entities and result in a de minimis recordkeeping requirement. The Commission also concludes that the new rules will positively impact schools and libraries, including small ones, seeking universal service support.²⁰³

3. Description and Estimate of the Number of Small Entities To Which Rules Will Apply

103. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.²⁰⁴ The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."²⁰⁵ In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.²⁰⁶ A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.²⁰⁷ A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."²⁰⁸ Nationwide, as of 1992, there were approximately 275,801 small organizations.²⁰⁹ The term "small governmental jurisdiction" is defined as "governments of cities, towns, townships, villages, school districts, or

²⁰² See *infra* paras. 106-107.

²⁰³ *Id.*, see *supra* paras. 14, 26, 38, 40, 42, and 52

²⁰⁴ 5 U.S.C. § 603(b)(3)

²⁰⁵ 5 U.S.C. § 601(6)

²⁰⁶ 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

²⁰⁷ Small Business Act, 15 U.S.C. § 632.

²⁰⁸ 5 U.S.C. § 601(4)

²⁰⁹ U.S. Census Bureau, 1992 Economic Census, Table 6 (special tabulation of data under contract to the Office of Advocacy of the U.S. Small Business Administration).

special districts, with a population of less than fifty thousand.”²¹⁰ As of 1997, there were about 87,453 governmental jurisdictions in the United States.²¹¹ This number includes 39,044 county governments, municipalities, and townships, of which 37,546 (approximately 96.2%) have populations of fewer than 50,000, and of which 1,498 have populations of 50,000 or more. Thus we estimate the number of small governmental jurisdictions overall to be 84,098 or fewer.

104. The Commission has determined that the group of small entities directly affected by the rules herein includes eligible schools and libraries and the eligible service providers offering them discounted services, including telecommunications service providers, Internet Service Providers (ISPs) and vendors of internal connections.²¹² Further descriptions of these entities are provided below. In addition, the Universal Service Administrative Company is a small organization (non-profit) under the RFA, and we believe that circumstances triggering the new reporting requirement will be limited²¹³ and does not constitute a significant economic impact on that entity.

a. Schools and Libraries

105. As noted, “small entity” includes non-profit and small government entities. Under the schools and libraries universal service support mechanism, which provides support for elementary and secondary schools and libraries, an elementary school is generally “a non-profit institutional day or residential school that provides elementary education, as determined under state law.”²¹⁴ A secondary school is generally defined as “a non-profit institutional day or residential school that provides secondary education, as determined under state law,” and not offering education beyond grade 12.²¹⁵ For-profit schools and libraries, and schools and libraries with endowments in excess of \$50,000,000, are not eligible to receive discounts under the program, nor are libraries whose budgets are not completely separate from any schools.²¹⁶ Certain other statutory definitions apply as well.²¹⁷ The SBA has defined for-profit, elementary and secondary schools and libraries having \$6 million or less in annual receipts as small entities.²¹⁸ In Funding Year 2 (July 1, 1999 to June 30, 2000) approximately 83,700 schools and 9,000 libraries

²¹⁰ 5 U.S.C. 601(5).

²¹¹ U.S. Census Bureau, Statistical Abstract of the United States 2000, Section 9, pages 299-300, Tables 490 and 492.

²¹² 47 C.F.R. §§ 54.502, 54.503, 54.517(b).

²¹³ See *supra* para 27.

²¹⁴ 47 C.F.R. § 54.500(b).

²¹⁵ 47 C.F.R. § 54.500(j)

²¹⁶ 47 C.F.R. § 54.501.

²¹⁷ See *id*

²¹⁸ 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) codes 611110 and 519120 (NAICS 2002 code 519120 was previously 514120).

received funding under the schools and libraries universal service mechanism. Although we are unable to estimate with precision the number of these entities that would qualify as small entities under SBA's size standard, we estimate that fewer than 83,700 schools and 9,000 libraries might be affected annually by our action, under current operation of the program.

b. Telecommunications Service Providers

106. We have included small incumbent local exchange carriers in this RFA analysis. A "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (e.g., a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation."²¹⁹ The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not "national" in scope.²²⁰ We have therefore included small incumbent carriers in this RFA analysis, although we emphasize that this RFA action has no effect on the Commission's analyses and determinations in other, non-RFA contexts.

107. *Incumbent Local Exchange Carriers (LECs).* Neither the Commission nor the SBA has developed a size standard for small incumbent local exchange services. The closest size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.²²¹ According to Commission data,²²² 1,337 incumbent carriers reported that they were engaged in the provision of local exchange services. Of these 1,337 carriers, an estimated 1,032 have 1,500 or fewer employees and 305 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by the rules and policies adopted herein.

108. *Competitive Local Exchange Carriers (CLECs), Competitive Access Providers (CAPs) and "Other Local Exchange Carriers."* Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to providers of competitive exchange services or to competitive access providers or to "Other Local Exchange Carriers." The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.²²³

²¹⁹ 5 U.S.C. § 601(3)

²²⁰ See Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC, dated May 27, 1999. The Small Business Act contains a definition of "small business concern," which the RFA incorporates into its own definition of "small business." See U.S.C. § 632(a) (Small Business Act), 5 U.S.C. § 601(3) (RFA). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. 13 C.F.R. § 121.102(b).

²²¹ 13 CFR § 121.201, NAICS code 513310 (changed to 517110 in Oct. 2002).

²²² FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, "Trends in Telephone Service" at Table 5.3, Page 5-5 (Aug. 2003). This source uses data that are current as of December 31, 2001.

²²³ 13 CFR § 121.201, NAICS code 513310 (changed to 517110 in Oct. 2002).

According to Commission data,²²⁴ 609 companies reported that they were engaged in the provision of either competitive access provider services or competitive local exchange carrier services. Of these 609 companies, an estimated 458 have 1,500 or fewer employees and 151 have more than 1,500 employees.²²⁵ In addition, 35 carriers reported that they were "Other Local Exchange Carriers." Of the 35 "Other Local Exchange Carriers," an estimated 34 have 1,500 or fewer employees and one has more than 1,500 employees.²²⁶ Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, and "Other Local Exchange Carriers" are small entities that may be affected by the rules and policies adopted herein.

109. *Interexchange Carriers (IXCs).* Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to interexchange services. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.²²⁷ According to the Commission's most recent data,²²⁸ 261 companies reported that their primary telecommunications service activity was the provision of payphone services. Of these 261 companies, an estimated 223 have 1,500 or fewer employees and 48 have more than 1,500 employees.²²⁹ Consequently, the Commission estimates that the majority of payphone service providers are small entities that may be affected by the rules and policies adopted herein.

110. *Wireless Service Providers.* The SBA has developed a small business size standard for wireless small businesses within the two separate categories of *Paging*²³⁰ and *Cellular and Other Wireless Telecommunications*.²³¹ Under both SBA categories, a wireless business is small if it has 1,500 or fewer employees. According to the Commission's most recent data,²³² 1,761 companies reported that they were engaged in the provision of wireless service. Of these 1,761 companies, an estimated 1,175 have 1,500 or fewer employees and 586 have more

²²⁴ FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, "Trends in Telephone Service" at Table 5.3, Page 5-5 (Aug. 2003).

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ 13 C.F.R. § 121.201, NAICS code 513310 (changed to 517110 in Oct. 2002).

²²⁸ FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, "Trends in Telephone Service" at Table 5.3, Page 5-5 (Aug. 2003).

²²⁹ *Id.*

²³⁰ 13 CFR § 121.201, North American Industry Classification System (NAICS) code 513321 (changed to 517211 in October 2002).

²³¹ 13 CFR § 121.201, North American Industry Classification System (NAICS) code 513322 (changed to 517212 in October 2002).

²³² FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, Trends in Telephone Service, Table 5.3, (May 2002).

than 1,500 employees.²³³ Consequently, the Commission estimates that most wireless service providers are small entities that may be affected by the rules and policies adopted herein.

111. *Private and Common Carrier Paging.* In the *Paging Third Report and Order*, we developed a small business size standard for “small businesses” and “very small businesses” for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.²³⁴ A “small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years. Additionally, a “very small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$3 million for the preceding three years. An auction of Metropolitan Economic Area licenses commenced on February 24, 2000, and closed on March 2, 2000.²³⁵ Of the 985 licenses auctioned, 440 were sold. Fifty-seven companies claiming small business status won. At present, there are approximately 24,000 Private-Paging site-specific licenses and 74,000 Common Carrier Paging licenses. According to Commission data, 474 carriers reported that they were engaged in the provision of either paging and messaging services or other mobile services.²³⁶ Of those, the Commission estimates that 457 are small, under the SBA approved small business size standard.²³⁷

c. Internet Service Providers

112. *Internet Service Providers.* The SBA has developed a small business size standard for “On-Line Information Services,” NAICS code 514191.²³⁸ This category comprises establishments “primarily engaged in providing direct access through telecommunications networks to computer-held information compiled or published by others.”²³⁹ Under this small business size standard, a small business is one having annual receipts of \$18 million or less.²⁴⁰ Based on firm size data provided by the Bureau of the Census, 3,123 firms are small under SBA’s \$18 million size standard for this category code.²⁴¹ Although some of these Internet Service

²³³ *Id.*

²³⁴ 220 MHz *Third Report and Order*, 12 FCC Rcd 10943, 11068-70 paras. 291-295 (1997), 62 FR 16004 (Apr. 3, 1997), at paras 291-295.

²³⁵ “Revision of Part 22 and Part 90 of the Commission’s Rules to Facilitate Future Development of Paging Systems,” *Memorandum Opinion and Order on Reconsideration and Third Report and Order*, 14 FCC Rcd 10030, at paras 98 (1999).

²³⁶ FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, Trends in Telephone Service, Table 5.3, p. 5-5 (Aug. 2003).

²³⁷ *Id.*

²³⁸ See generally North American Industry Classification System – United States (1997), NAICS code 514191

²³⁹ See generally North American Industry Classification System – United States (1997), NAICS code 514191.

²⁴⁰ 13 CFR § 121.201, NAICS code 514191

²⁴¹ Office of Advocacy, U S Small Business Administration, Firm Size Data by Industry and Location.

Providers (ISPs) might not be independently owned and operated, we are unable at this time to estimate with greater precision the number of ISPs that would qualify as small business concerns under SBA's small business size standard. Consequently, we estimate that there are 3,123 or fewer small entity ISPs that may be affected by this analysis.

d. Vendors of Internal Connections

113 The Commission has not developed a small business size standard specifically directed toward manufacturers of internal network connections. The closest applicable definitions of a small entity are the size standards under the SBA rules applicable to manufacturers of "Radio and Television Broadcasting and Communications Equipment" (RTB) and "Other Communications Equipment."²⁴² According to the SBA's regulations, manufacturers of RTB or other communications equipment must have 750 or fewer employees in order to qualify as a small business.²⁴³ The most recent available Census Bureau data indicates that there are 1,187 establishments with fewer than 1,000 employees in the United States that manufacture radio and television broadcasting and communications equipment, and 271 companies with less than 1,000 employees that manufacture other communications equipment.²⁴⁴ Some of these manufacturers might not be independently owned and operated. Consequently, we estimate that the majority of the 1,458 internal connections manufacturers are small.

e. Miscellaneous Entities

114. *Wireless Communications Equipment Manufacturers.* The SBA has established a small business size standard for radio and television broadcasting and wireless communications equipment manufacturing. Under this standard, firms are considered small if they have 750 or fewer employees.²⁴⁵ Census Bureau data for 1997 indicate that, for that year, there were a total of 1,215 establishments²⁴⁶ in this category.²⁴⁷ Of those, there were 1,150 that had employment under 500, and an additional 37 that had employment of 500 to 999. The percentage of wireless

²⁴² 13 C.F.R. § 121.201, NAICS Code 334220, 334290

²⁴³ *Id.*

²⁴⁴ 1997 Economic Census, Manufacturing, Industry Series, Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing, Document No. E97M-3342B (August 1999), at 9; 1997 Economic Census, Manufacturing, Industry Series, Other Communications Equipment Manufacturing, Document No. EC97M-3342C (September 1999), at 9 (both available at <http://www.census.gov/prod/www/abs/97ecmani.html>).

²⁴⁵ *Id.*

²⁴⁶ The number of "establishments" is a less helpful indicator of small business prevalence in this context than would be the number of "firms" or "companies," because the latter take into account the concept of common ownership or control. Any single physical locations for an entity is an establishment, even though that location may be owned by a different establishment. Thus, the numbers given may reflect inflated numbers of businesses in this category, including the numbers of small businesses. In this category, the Census breaks-out data for firms or companies only to give the total number of such entities for 1997, which was 1,089.

²⁴⁷ U.S. Census Bureau, 1997 Economic Census, Industry Series. Manufacturing, "Industry Statistics by Employment Size," Table 4, NAICS code 334220 (issued August 1999).

equipment manufacturers in this category is approximately 61.35%,²⁴⁸ so the Commission estimates that the number of wireless equipment manufacturers with employment under 500 was actually closer to 706, with an additional 23 establishments having employment of between 500 and 999. Given the above, the Commission estimates that the majority of wireless communications equipment manufacturers are small businesses.

4. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

115. In this *Third Report and Order*, we adopt a rule that prohibits the transfer of equipment purchased with universal service discount, except in limited circumstances. Further, we provide that the excepted, limited circumstances consist of a discount recipient temporarily or permanently closing its operations where the original equipment was installed. In that instance, we require a recipient, who closes permanently or temporarily and transfers equipment to another eligible entity, to notify the Administrator of a transfer and require the transferring and receiving entities to maintain detailed records of the transfer consistent with the Commission's recordkeeping requirements for five years. We do not believe that these reporting and recordkeeping requirements will result in a significant economic impact.

116. The rule adopted today, limiting the frequency of receiving discount rates for internal connections, does not involve additional reporting, recordkeeping, or compliance requirements for small entities. Similarly, the rule adopted in this *Third Report and Order*, creating a more formal process for annually updating the list of services eligible for support, does not involve additional reporting, recordkeeping, or compliance requirements for small entities. The rules adopted governing cost allocation between eligible and ineligible services, provision of free services, and service substitution do not impose additional reporting, recordkeeping, or compliance requirements for small entities. Finally, the rules regarding carryover of unused funds do not require additional reporting or recordkeeping for small entities participating in the schools and libraries universal support mechanism.

5. Steps Taken to Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered

117. The RFA requires an agency to describe any significant alternatives that it has considered in developing its approach, which may include the following four alternatives (among others): "(1) establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities."²⁴⁹

118. Although we received no IRFA comments, we considered alternatives to the

²⁴⁸ *Id.* Table 5, "Industry Statistics by Industry and Primary Product Class Specialization" 1997 "

²⁴⁹ 5 U.S.C. § 603(c)(1)-(4).

proposed recordkeeping requirements for small entities. In creating the narrow exception to the equipment transfer policy adopted in this *Third Report and Order*, we recognize the Commission's need to protect the integrity of the schools and libraries support mechanism by curbing waste, fraud, and abuse while acknowledging circumstances that justify permitting the transfer of discounted equipment received by a program beneficiary, small or large. We recognize that we must require certain recordkeeping to verify the appropriate use of universal service funds. Consideration was afforded to having the recipient file equipment transfer records with USAC and having USAC maintain the records. However, we conclude that requiring a filing with USAC would be more burdensome for the recipient than having the recipient collect and maintain its equipment transfer records. Complying with the processes promulgated by USAC would be more burdensome than requiring each beneficiary to retain its own files because the beneficiary would have to do more than send the documents to USAC. The beneficiary would have to comply with the procedural scheme devised by USAC for compiling, and mailing or delivering the records, and quality control measures for assuring that the records submitted were properly identified with the correct beneficiary. In the RFA, an exemption of small entities from the recordkeeping requirements is listed as a possible alternative. In this instance, exemption from the recordkeeping requirement would impede the Commission's ability to account for funds distributed through the schools and libraries program and would undermine the Commission's efforts to prevent waste, fraud, and abuse.

119. **Report to Congress:** The Commission will send a copy of the Order, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A). In addition, the Commission will send a copy of the Order, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the Order and FRFA (or summaries thereof) will also be published in the Federal Register.²⁵⁰

C. Initial Paperwork Reduction Act of 1995 Analysis

120. This Second Further Notice of Proposed Rulemaking (*Second FNPRM*) contains either a proposed or modified information collection. As part of a continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the information collections contained in this Further Notice, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. Public and agency comments are due at the same time as other comments on this Further Notice; OMB comments are due 60 days from the date of publication of this Further Notice in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

²⁵⁰ See 5 U.S.C. § 604(b)

D. Initial Regulatory Flexibility Analysis

121. As required by the Regulatory Flexibility Act (RFA),²⁵¹ the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policies and rules proposed in the *Second FNPRM*. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Second FNPRM* provided below in section IV.C. The Commission will send a copy of this *Second FNPRM*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).²⁵² In addition, the *Second FNPRM* and IRFA (or summaries thereof) will be published in the Federal Register.²⁵³

1. Need for, and Objectives of, the Proposed Rules

122. In the *Second FNPRM*, we seek comment on whether the current discount matrix provides sufficient incentives for schools and libraries to limit funding requests to services that can be efficiently used and whether modifying the discount matrix would make funds available to a greater number of schools and libraries. Further, we ask whether the Commission should adopt rules adjusting the discount matrix for certain supported services.²⁵⁴ To the extent that commenters support creating a separate discount matrix for priority two services, we seek comment on the structure and implementation issues associated with a new discount matrix.²⁵⁵ In light of the limitations placed on applications for internal connection discounts, which are Priority Two services, we seek comment on measures to deter the mischaracterization of internal connections as Priority One services.²⁵⁶

123. In addition, we seek comment on whether the current process for applying for discounted services sufficiently addresses the Commission's goals of minimizing waste, fraud, and abuse in the program, while encouraging the benefits of competition as set out in the *Universal Service Order*.²⁵⁷ In that regard, we solicit comment on the current competitive bidding process and the efficiency and effectiveness of using Form 470 and requested comment regarding any means by which the Commission could ensure that applicants select cost-effective services.²⁵⁸ Also, we seek further comment whether the Commission, as a condition of support, should require

²⁵¹ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. §§ 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

²⁵² See 5 U.S.C. § 603(a).

²⁵³ See *id*

²⁵⁴ See *supra* para 59.

²⁵⁵ See *supra* paras. 61-62.

²⁵⁶ See *supra* para 61

²⁵⁷ See *supra* paras. 63-66.

²⁵⁸ *Id*

that each service provider certify that the prices in its bid have been independently developed.²⁵⁹ Further, we request comment on whether the Commission's rules should specifically require that records related to the competitive bidding process for services be maintained by both the recipient and service provider for a period of five years.

124. Next, we seek comment on modifications to the definition of "rural area" for the schools and libraries mechanism and ask whether it would be necessary or desirable to use the same definition of "rural" for both the schools and libraries program and rural health care program.²⁶⁰ Similarly, we seek comment whether the definition of Internet access in the schools context should be changed to mirror the definition of Internet access recently adopted in the *Rural Health Care Order*.²⁶¹

125. In light of the restrictions imposed on receiving discounts for internal connections, we seek comment asking whether any measures should be taken to evaluate service provider charges for capital investments for wide area networks, a Priority One service.²⁶² In that regard, we seek comment whether expenditures that subsidize infrastructure investment, either on-premises or off-premises, may properly be viewed as Priority One services.²⁶³ We also seek comment on funding for unlit (dark) fiber under the E-rate program. In addition, we ask whether we should adopt specific recovery rules for funds – entire or partial commitments – that are disbursed in violation of the statute or programmatic rules or procedures.²⁶⁴ In that connection, we seek comment regarding measures to prevent waste, fraud, and abuse associated with improper disbursement of E-rate funds.²⁶⁵

126. We seek comment on various measures to abate waste, fraud and abuse in the schools and libraries universal service mechanism, including whether a rule should be adopted requiring that all records related to the receipt of or delivery of discounted services be maintained by beneficiaries and service providers for a period of five years after the completion of the discounted services.²⁶⁶ In addition, we solicit comment whether rules defining "cost-effective" service should be adopted.²⁶⁷ Also, we seek comment whether applicants should be required to identify any consultants or other outside experts, whether paid or unpaid, that aid in the

²⁵⁹ See *supra* para 66.

²⁶⁰ See *supra* paras 67-69.

²⁶¹ See *supra* paras 70-71.

²⁶² See *supra* paras. 72-73.

²⁶³ See *supra* paras 73-74

²⁶⁴ See *supra* paras. 81-82

²⁶⁵ See *supra* paras. 83-84.

²⁶⁶ See *supra* paras 88-90.

²⁶⁷ See *supra* para 87.

preparation of the applicant's technology plan or in the applicant's procurement process.²⁶⁸ In addition, we solicit comment on the adoption of a rule requiring the filing of a Service Provider Annual Certification (or FCC Form 473) with the Administrator for remittance of payment.²⁶⁹ We also seek comment as to whether the Commission should codify rules establishing deadlines for service providers to file invoices with the Administrator and whether the Administrator's existing policy to deny support for untimely filed invoices, except in limited circumstances, should be codified.²⁷⁰ In an effort to further reduce waste, fraud and abuse in the E-rate program, we request comment whether current guidelines from the *Universal Service Order* and USAC regarding the content of the applicants' technology plans should be adopted as Commission rules. We also ask for comments whether the Commission's technology planning goals should be consistent with the requirements of the U.S. Department of Education and the U.S. Institute for Museum and Library Services. In addition, we seek comment whether the Commission should adopt rules to prevent individual schools and libraries from submitting applications without coordination with or authorization from the central authorities, namely school districts and library systems. We solicit comment on whether USAC's policy of accepting surveys to determine National School Lunch eligibility should be codified.

127. Finally, we seek comment whether our rules should be modified to ensure a funding priority for applicants that have not yet achieved internet connectivity in their classrooms or libraries. We also seek comment generally on whether any rules should be adopted to ensure affordable rates for eligible services and ensure access to eligible services.

2. Legal Basis

128. The legal basis for the *Second FNPRM* is contained in sections 1 through 4, 201 through 205, 254, 303(r), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151 - 154, 201 - 205, 254, 303(r), and 403, and section 1.411 of the Commission's rules, 47 C.F.R. § 1.411.

3. Description and Estimate of the Number of Small Entities to Which Rules Will Apply

129. We have described in detail in the Final Regulatory Flexibility Analysis in this proceeding, *supra*, the categories of entities that may be directly affected by our proposals. For this Initial Regulatory Flexibility Analysis, we hereby incorporate those entity descriptions by reference.²⁷¹

4. Description of Projected Reporting, Recordkeeping, and Other

²⁶⁸ See *supra* para 91.

²⁶⁹ See *supra* para. 92. We also noted that current administrative procedures require the filing a FCC Form 473 to receive payment.

²⁷⁰ See *supra* para 93.

²⁷¹ See *supra* para 102.

Compliance Requirements

130. With one exception, the specific proposals under consideration in this *Second FNPRM* would not, if adopted, result in additional recordkeeping requirements for small businesses. With regard to the one exception, we propose adoption of a rule that requires each entity receiving supported services to keep all records related to the receipt of or delivery of discounted services for a period of five years after implementation of the discounted services. This proposal includes additional recordkeeping because the current Commission rule requires each entity receiving supported services to keep records related to receipt of discounted services similar to those that the entity maintains for other purchases and does not specify the time period for which such records must be maintained. Thus, the revised rule means that the records need not be kept beyond the five year period.

131. We have sought comments regarding the other proposed rules; however, new recordkeeping requirements are not involved.

5. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

132. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance and reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or part thereof, for small entities.²⁷²

133. In the *Second FNPRM*, we seek comment regarding the adoption of rules requiring addition recordkeeping for each entity receiving discounted services. Moreover, we seek comments asking for identification of any recordkeeping measures that would improve the Commission's ability to enforce its rules governing waste, fraud, and abuse in the schools and libraries program. In that regard, we note the findings by recent beneficiary audits conducted by KPMG, which indicate that better documentation would improve the ability to audit beneficiaries. Since abatement of waste, fraud, and abuse in the schools and libraries program is the objective, excluding small entities from such a requirement would contravene that objective and present a loophole that could damage the integrity of the program. Decreasing the likelihood of waste, fraud, and abuse preserves program funding for discounts to all eligible schools and libraries. We invite comment on this recordkeeping requirement and ask that those parties who object to the proposed requirement offer an alternative and explain the merits of their alternative.

6. Federal Rules that may Duplicate, Overlap, or Conflict with the Proposed Rules

134. None.

²⁷² See 5 U.S.C. § 603(c).

E. Comment Filing Procedures

135. We invite comment on the issues and questions set forth in the *Second FNPRM* and Initial Regulatory Flexibility Analysis contained herein. Pursuant to applicable procedures set forth in sections 1.415 and 1.419 of the Commission's rules,²⁷³ interested parties may file comments on or before **30** days after publication in the Federal Register of this *Second FNPRM*, and reply comments on or before **60** days after publication in the Federal Register of this *Second FNPRM*. All filings should refer to CC Docket No. 02-6. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies.²⁷⁴

136. Comments filed through the ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/cgb/ecfs/>. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To receive filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form ." A sample form and directions will be sent in reply.

137. Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number.

138. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail).

139. The Commission's contractor, Natek, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002.

- The filing hours at this location are 8:00 a.m. to 7:00 p.m.

- All hand deliveries must be held together with rubber bands or fasteners.

- Any envelopes must be disposed of before entering the building.

- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

- U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed

²⁷³ 47 C.F.R. §§ 1.415, 1.419

²⁷⁴ See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

to 445 12th Street, SW, Washington, D.C. 20554.

-All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

140. Parties filing electronic media should be advised that the Commission released a public notice on August 22, 2003 providing new guidance for mailing electronic media.²⁷⁵ In brief, electronic media should NOT be sent through USPS because of the eradication process USPS mail must undergo to complete delivery. Hand or messenger delivered electronic media for the Commission's Secretary should be addressed for delivery to 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002, and other messenger-delivered electronic media should be addressed for delivery to 9300 East Hampton Drive, Capitol Heights, MD 20743.

141. Parties who choose to file by paper should also submit their comments on diskette to Sheryl Todd, Telecommunications Access Policy Division, Wireline Competition Bureau, Federal Communications Commission, 445 12th Street, SW, Room 5-B540, Washington, DC, 20554. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible format using Microsoft Word or compatible software. The diskette should be accompanied by a cover letter and should be submitted in "read only" mode. The diskette should be clearly labeled with the commenter's name, proceeding (including the docket number, in this case, CC Docket No. 02-6), type of pleading (comment or reply comment), date of submission, and the name of the electronic file on the diskette. The label should also include the following phrase "Disk Copy - Not an Original." Each diskette should contain only one party's pleading, preferably in a single electronic file. In addition, commenters must send diskette copies to the Commission's copy contractor, Natek, Inc., Portals II, 445 12th Street, SW, Room CY-B402, Washington, DC, 20554.

142. Regardless of whether parties choose to file electronically or by paper, parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, Qualex, International Inc., Portals II, 445 12th Street, SW, Room CY-B402, Washington, DC, 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room CY-A257, 445 12th Street, SW, Washington, DC, 20554. In addition, the full text of this document is available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW, Room CY-A257, Washington, DC, 20554. This document may also be purchased from the Commission's duplicating contractor, Qualex International, Inc., Portals II, 445 12th Street, SW, Room CY-B402, Washington, DC, 20554, telephone 202-863-2893, facsimile 202-863-2898, or via e-mail qualexint@aol.com.

143. Comments and reply comments must include a short and concise summary of the substantive arguments raised in the pleading. Comments and reply comments must also comply with section 1.49 and all other applicable sections of the Commission's rules.²⁷⁶ We direct all

²⁷⁵ *Reminder – Filing Locations for Paper Documents and Instructions for Mailing Electronic Media*, Public Notice, DA 03-2730 (rel. Aug. 22, 2003).

²⁷⁶ See 47 C.F.R. § 1.49.

interested parties to include the name of the filing party and the date of the filing on each page of their comments and reply comments. All parties are encouraged to utilize a table of contents, regardless of the length of their submission. We also strongly encourage parties to track the organization set forth in the FNPRM in order to facilitate our internal review process.

F. Further Information

144. Alternative formats (computer diskette, large print, audio recording, and Braille) are available to persons with disabilities by contacting Brian Millin at (202) 418-7426 voice, (202) 418-7365 TTY, or bmillin@fcc.gov. This Third Report and Order and Second FNPRM can also be downloaded in Microsoft Word and ASCII formats at http://www.fcc.gov/wcb/universal_service/schoolsandlibs.html.

145. For further information, contact Kathy Tofigh at (202) 418-1553, Karen Franklin at (202) 418-7706, or Jennifer Schneider at (202) 418-0425 in the Telecommunications Access Policy Division, Wireline Competition Bureau.

VI. ORDERING CLAUSES


146. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 1, 4(i), 4(j), 201-205, 214, 254, and 403 of the Communications Act of 1934, as amended, this Third Report and Order IS ADOPTED.

147. IT IS FURTHER ORDERED that Part 54 of the Commission's rules, 47 C.F.R. Part 54, IS AMENDED as set forth in Appendix A attached hereto, effective thirty (30) days after the publication of this Third Report and Order in the Federal Register.

148. IT IS FURTHER ORDERED that, pursuant to the authority contained in sections 1, 4(i), 4(j), 201-205, 214, 254, and 403 of the Communications Act of 1934, as amended, this Second Further Notice of Proposed Rulemaking IS ADOPTED.

149. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Third Report and Order and Second Further Notice of Proposed Rulemaking, including the Final Regulatory Flexibility Analysis and Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION



Marlene H. Dortch
Secretary